

NEW APPROACH TO ARTICLE 22 EUMR - A BACK DOOR TO CLOSE THE "ENFORCEMENT GAP"?

On 11 September 2020, Competition Commissioner, Margrethe Vestager, announced that, from mid-2021, the European Commission (the "**Commission**") will begin accepting requests for referral by national competition authorities of Member States ("**NCA**s") in relation to transactions which may significantly affect competition, irrespective of whether those transactions meet the national merger control thresholds of the NCA making the request.¹ This is a significant shift in policy, with potentially far-reaching consequences.

OVERVIEW

The EU merger regulation ("**EUMR**") provides certain mechanisms to refer the review of transactions from the authority having primary jurisdiction over a transaction (the Commission or the NCA) to another, depending – broadly speaking – on which authority is better placed to review the transaction.

Article 22 EUMR allows for a transaction to be referred to the Commission by one or more NCAs, where that transaction "threatens to significantly affect competition". The mechanism under Article 22 - often called the "Dutch clause" - was initially introduced in 1989 to allow Member States without a national merger control regime, which at the time included the Netherlands, to ensure that potentially anti-competitive mergers could be reviewed via a referral to the Commission.

The Netherlands, along with several other EU member states, subsequently adopted national merger control regimes and in recent years, the Commission has had an informal policy of discouraging NCAs from initiating a referral in respect of transactions which do not meet the relevant national filing thresholds. That said, once a referral has been initiated by an NCA having jurisdiction under its national laws, NCAs from other Member States can join that referral request, resulting in the Commission also assessing the effects of the transaction in those other Member States. It is often the case that NCAs joining the referral request do not have jurisdiction to review the transaction under their national merger control regimes. In Apple/Shazam, for example, only two of the six NCAs that joined Austria's referral request would have been able to review the transaction under their national laws.

Key issues

- From mid-2021, the Commission will consider the referral of transactions from NCAs regardless of whether those transactions meet national merger control thresholds.
- Transactions which fall below national and EU merger control thresholds could therefore be subject to review.
- The new approach to Article 22 is expected to impact deal negotiations and timelines.
- The change in policy is likely to be a response to a perceived gap in merger control rules and the rise of so-called "killer acquisitions".
- The Commission is expected to provide further guidance on how such referrals will work in practice.

¹ Margrethe Vestager, [The Future of EU Merger Control](#), 11 September 2020.

The recent statement by Commissioner Vestager (since confirmed by Olivier Guersent, Director-General of the Commission's DG Competition) therefore signals a considerable change in approach, but is likely to primarily affect those transactions which do not meet the thresholds for review in any of the 26 EU Member States that have a merger control regime, and which would therefore not be considered appropriate for referral under the Commission's current policy.

The Commission's proposal to extend the ambit of Article 22 is ostensibly a response to a perceived gap in EU merger control law and allows for the review of potentially problematic transactions (including, for instance, so-called "killer acquisitions") that fall below merger control thresholds at EU and national level.

While the Commission is expected to provide guidance on how and when referrals under Article 22 will be accepted, it is notable - and unsurprising - that Commissioner Vestager specifically called out mergers in the digital and pharmaceutical sectors as examples of industries in which transactions worth reviewing may fall under the applicable merger control thresholds.

IMPLICATIONS

The new approach to Article 22 will have several implications for deal negotiations and timing:

- **Reduced legal certainty:** certain features of the new proposal give rise to legal uncertainty. In the first instance, simply falling below EU and national merger control thresholds will no longer suffice to exclude a filing in the EU. Rather, parties to a deal will need to assess whether a transaction is likely to "significantly affect competition" in one or more Member States. Depending on the facts of the case, such an assessment may be far from clear cut. Second, Article 22 provides that a Member State must make a request within 15 working days of the transaction being notified to it, or in the absence of a notification, the transaction being "made known to the Member State concerned." The Commission has interpreted the concept of a transaction being "made known" to mean the receipt of sufficient information to allow the NCA to make a preliminary assessment as to whether the criteria for making an Article 22 referral request are met. In cases where the parties have not voluntarily approached the NCA, it may therefore be possible for a referral to be made even if a substantial amount of time has passed since the transaction closed.
- **Potential delays to the deal timetable:** a referral under Article 22 involves a lengthy process comprising (i) 15 working days from the transaction being made known to the NCA for it to refer the transaction to the Commission, (ii) once notified of the request by the Commission, other Member States have 15 working days to join the referral request, (iii) followed by up to another 10 working days for the Commission to decide whether it will accept the referral; (iv) only then, and subject to whether prenotification discussions are required, the Commission's 25 working day phase 1 review timeline commences.
- **Uncertainty regarding deal completion:** a transaction which does not trigger any mandatory, suspensory filings can be completed without waiting for clearance from a competition authority. Following a referral under Article 22 however, once the Commission accepts jurisdiction to review the merger, the transaction cannot complete prior to receiving clearance. This adds a further layer of complexity to the deal timeline as it requires parties to consider the likelihood of the Commission accepting a referral and the risks related to completing a transaction prior to the Commission taking jurisdiction. Parties may also wish to consider taking this risk into account in the transaction documents, which makes antitrust advice early in the process critical.

The Commission's guidance on its new approach to referrals under Article 22 guidelines, once adopted, should hopefully shed light on how it envisages such referrals to work in practice and the timetables that parties can expect to face.

CONTACTS



Thomas Vinje
Partner, Chairman,
Global Antitrust Group
T +32 2 533 5929
E thomas.vinje
@cliffordchance.com



Katrin Schallenberg
Partner
T +33 1 4405 2457
E katrin.schallenberg
@cliffordchance.com



Dan Harrison
Knowledge Director
T +44 207006 4136
E daniel.harrison
@cliffordchance.com



Stavroula Vryna
Senior Associate
T +44 207006 4106
E stavroula.vryna
@cliffordchance.com



Nivi Balaji
Associate
T +33 1 4405 5204
E nivi.balaji
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 1 rue d'Astorg, CS 60058,
75377 Paris Cedex 08, France

© Clifford Chance 2020

Clifford Chance Europe LLP est un cabinet de sollicitors inscrit au barreau de Paris en application de la directive 98/5/CE, et un limited liability partnership enregistré en Angleterre et au pays de Galles sous le numéro OC312404, dont l'adresse du siège social est 10 Upper Bank Street, London, E14 5JJ.

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Dubai •
Düsseldorf • Frankfurt • Hong Kong • Istanbul •
London • Luxembourg • Madrid • Milan •
Moscow • Munich • Newcastle • New York •
Paris • Perth • Prague • Rome • São Paulo •
Seoul • Shanghai • Singapore • Sydney •
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.